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Badan Peguam Negara v Kerajaan Malaysia

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–8 OF 2007(W)

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ZAKI AZMI CHIEF JUSTICE, ABDUL AZIZ MOHAMAD FCJ, GOPAL SRI RAM, MOHD GHAZALI AND TENGKU BAHARUDIN SHAH JJCA

5 DECEMBER 2008

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Administrative Law — Exercise of judicial functions — Appointment of judicial commissioner — Injustice on face of record — Whether appointment was null and void because it contravened arts 122AB and 123 of the Federal Constitution — Whether leave to review decision under r 137 of the Rules of the Federal Court

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1995 ought to be granted — Whether error would result in serious misinterpretation of the Federal Constitution and affect future appointments to the Bench — Federal Constitution arts 122AB & 123 — Rules of the Federal Court 1995 r 137

E

Administrative Law — Exercise of judicial functions — Bias — Test of real danger of bias — Whether statements showed real danger of bias

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About four months after Dr Badariah Sahamid ('Dr Badariah') was appointed as judicial commissioner of the High Court in Malaya, the Malaysian Bar Council ('the applicant') filed an originating summons in the High Court seeking a declaration that the appointment of Dr Badariah was null and void on the grounds that the said appointment contravened art 122AB read with

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art 123 of the Federal Constitution ('Constitution'). Dr Badariah, who was admitted to the bar in 1987, was until her appointment a lecturer at the Faculty of Law of the University of Malaya. As such, she did not have a practising certificate and was not in those ten years prior to her appointment as a judicial commissioner practising as an advocate and solicitor. The

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applicant was of the view that the word 'advocate' in art 123 meant a practising advocate and that a person who had been called to the Bar and yet did not practise should not qualify to be a judicial commissioner. At the request of the defendant, the application was referred to the Federal Court pursuant to s 84 of the Courts of Judicature Act 1964. On 22 December

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2007 the Federal Court by a majority of three to two decided in effect that the word 'advocate' in art 123 did not necessarily mean a practising advocate and that therefore the appointment of Dr Badariah as a judicial commissioner was valid. The majority decision was delivered by Nik Hashim, Azmel and Hashim FCJJ while the minority decision was by Abdul Hamid

Mohamad CJ and Zulkefli Ahmad Makinudin FCJ. The applicant was of the view that this majority judgment was erroneous. This was the applicant's application, under r 137 of the Rules of the Federal Court 1995 ('Rules') for leave to review the majority judgment with the aim of setting aside that judgment and having the special case reheard by another panel of the Federal Court. The applicant submitted that the majority decision was in error and that it resulted in a serious misinterpretation of the Constitution that may affect future appointments of this nature to the Bench. The applicant founded its claim for injustice by relying on the Federal Court's decision in *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 (*Rajasegaran*'s case), which was about the appointment of a chairman of the industrial court under s 23A(1) of the Industrial Relations Act 1967. The applicant submitted that so long as the decision of the court in *Dr Badariah*'s case stands, it would create a situation whereby to be appointed a chairman of the industrial court a person would have to be in practice for the required number of years whereas to be appointed a judge of a High Court or a judicial commissioner, an advocate need not be in practice for the required number of years and the injustice would lie in such a situation. The applicant further submitted that the empanelment of the panel hearing the special case on 22 December 2007 was unfair because Nik Hashim FCJ should not have been empanelled to sit on the impugned appeal as he had held in *Rajasegaran*'s case that Rajasegaran's appointment was valid and that therefore it was likely that he would also decide that Dr Badariah's appointment was valid. In addition the applicant also submitted that there was a clear element of bias in the judgment of Azmel Ma'amor FCJ, a member of the court forming the majority, in that he had adverted to extraneous matters in his judgment when coming to his conclusion.

Held, dismissing the application with no order as to costs:

(1) (per **Zaki Azmi Chief Justice**) In order for this application to succeed the applicant must be able to show that there was injustice on the face of the record. The discretion under r 137 can only be exercised where the error is obvious on the face of the record. It is inherently obvious that a disagreement in the interpretation of the law cannot appear on the face of the record as this is a matter of opinion. As such, even if there are inconsistent judgments on the same issue, it can only be raised in another case with similar issues but not by reviewing this decision. Therefore even if there was a disagreement with the earlier panel on the interpretation of the relevant articles of the Constitution, it does not warrant setting aside the judgment for otherwise there is no end to the proceedings. A final appeal will only be reopened if it can be shown that there was a probability of a significant injustice which must be clearly established and that there was no effective alternative remedy to correct

this injustice. It must also be shown that there were special circumstances which resulted in the process having been corrupted. In the present case there was no real requirement for proceedings to be reopened (see paras 12, 16 & 23).

(2) (per **Zaki Azmi Chief Justice, Gopal Sri Ram, Mohd Ghazali** and **Tengku Baharudin Shah JJCA**) There was no procedural injustice in this case when Nik Hashim FCJ, who had produced the judgment of the Court of Appeal in *Rajasegaran*'s case which was later reversed by the Federal Court, was empanelled as member of the court hearing the challenge. There was no assurance that he would have arrived at the same conclusion as he did in *Rajasegaran*'s case as he would have to reconsider *Dr Badariah*'s case on the facts of the case. In any case the applicable laws relating to the appointment of Rajasegaran and that relating to the appointment of Dr Badariah were different and the two provisions had to be construed separately (see paras 30, 56–57).

(3) (per **Gopal Sri Ram, Mohd Ghazali** and**Tengku Baharudin Shah JJCA**) After reading the judgment of Azmel FCJ as a whole it was clear that he proceeded along the lines that the Constitution should receive a wide and liberal interpretation. Although he did in the course of his judgment advert to the appointments of other persons as judges or judicial commissioners when they also did not qualify and questioned why the applicant did not challenge such appointments, the complaint that other appointees were mentioned was a matter that must be addressed in other proceedings brought by the persons adversely affected and not in the present. In the circumstances the applicant had not suffered any procedural injustice and the allegation of bias was not made out (see paras 49 & 56).

(4) (per **Zaki Azmi Chief Justice** and **Abdul Aziz bin Mohamad FCJ**) The statements made by Azmel FCJ comparing the appointment of Dr Badariah to the appointment of others as judges and judicial commissioners did not contribute towards his actual decision in holding that Dr Badariah's appointment was valid. They did not show a real danger of bias against the applicant because these statements discussing the positions of the others were made after the decision to hold Dr Badariah's appointment as valid and therefore did not contribute towards his ratio decidendi. Azmel FCJ's judgment as a whole had facets to it and the first facet of the judgment where the essential matter of the interpretation of art 123 was considered as the essential part of the judgment and that alone would have been sufficient for a decision against the applicant on the special case. As such the essential question in this case was not influenced by any bias against the applicant (see paras 32 & 51).

Per incuriam:

Gopal Sri Ram, Mohd Ghazali and Tengku Baharudin Shah JJCA have in their grounds of judgment taken the opportunity to consider r 137 of the Rules and have set out the circumstances in which it may be resorted to. They had concluded contrary to previous decisions of the Federal Court that this court had no inherent jurisdiction to review its own decisions except on very limited grounds. However, the subject of whether this court had the jurisdiction to review under r 137 of the Rules was not in issue in this case (per Abdul Aziz Mohamad FCJ) (see para 53).

[Bahasa Malaysia summary

Lebih kurang empat bulan selepas Dr Badariah Sahamid ('Dr Badariah') dilantik sebagai pesuruhjaya kehakiman Mahkamah Tinggi Malaya, Badan Peguam Malaysia ('pemohon') memfailkan saman pemula di Mahkamah Tinggi memohon deklarasi bahawa pelantikan Dr Badariah adalah batal dan tidak sah atas alasan bahawa pelantikan tersebut bercanggah dengan perkara 122AB yang dibaca bersama perkara 123 Perlembagaan Persekutuan ('Perlembagaan'). Dr Badariah, yang didaftaraikan Majlis Peguam pada tahun 1987, sehingga pelantikannya adalah seorang pensyarah di Fakulti Undang-Undang di Universiti Malaya. Oleh yang demikian dia tidak mempunyai sijil amalan dan tidak dalam tempoh sepuluh tahun sebelum pelantikan beliau sebagai pesuruhjaya kehakiman beramal sebagai peguambela dan peguamcara. Pemohon berpendapat bahawa perkataan 'peguambela' dalam perkara 123 bermaksud peguambela yang mengamalkan undang-undang dan seseorang yang didaftaraikan Majlis Peguam tetapi tidak mengamalkan undang-undang tidak sepatutnya layak menjadi pesuruhjaya kehakiman. Dengan permintaan defendan, permohonan tersebut dirujuk ke Mahkamah Persekutuan menurut s 84 Akta Mahkamah Kehakiman 1964. Pada 22 Disember 2007 Mahkamah Persekutuan dengan majoriti tiga kepada dua memutuskan bahawa perkataan 'peguambela' dalam perkara 123 tidak semestinya bermaksud peguambela yang mengamalkan undang-undang dan oleh itu pelantikan Dr Badariah sebagai pesuruhjaya kehakiman adalah sah. Keputusan majoriti disampaikan oleh Nik Hashim, Azmel dan Hashim HHMP sementara keputusan minoriti disampaikan oleh Abdul Hamid Mohamad KH dan Zulkefli Ahmad Makinudin HMP. Pemohon berpendapat bahawa penghakiman majoriti ini adalah silap. Ini adalah permohonan pemohon, di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('Kaedah') untuk kebenaran menyemak semula penghakiman majoriti tersebut dengan tujuan untuk mengenepikan penghakiman tersebut dan mendapatkan kes khas didengar semula oleh panel mahkamah persekutuan yang lain. Pemohon menghujahkan bahawa keputusan majoriti tersebut adalah silap dan ia mengakibatkan salah tafsiran yang nyata Perlembagaan yang boleh memberi kesan di masa hadapan ke atas

A pelantikan seperti ini kepada anggota kehakiman. Pemohon mendasarkan tuntutannya untuk ketidakadilan dengan bergantung kepada keputusan Mahkamah Persekutuan dalam kes *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 (*Rajasegaran*), yang berkenaan dengan pelantikan pengerusi mahkamah perusahaan di bawah s 23A(1) Akta
B Perhubungan Perusahaan 1967. Pemohon menghujahkan bahawa selagi keputusan mahkamah dalam kes *Dr Badariah* efektif, ia akan menyebabkan situasi di mana untuk dilantik sebagai pengerusi mahkamah perusahaan seseorang perlu menjalankan amalan selama tempoh 10 tahun yang
C dikehendaki sebaliknya untuk dilantik sebagai hakim Mahkamah Tinggi atau pesuruhjaya kehakiman, seorang peguambela tidak perlu amalan untuk tempoh yang diperlukan dan ketidakadilan akan terdapat dalam situasi tersebut. Pemohon seterusnya menghujahkan bahawa pemilihan panel perbicaraan kes khas pada 22 Disember 2007 adalah tidak adil kerana Nik
D Hashim MHP tidak sepatutnya dipilih berada dalam rayuan yang dipersoalkan itu kerana beliau telah memutuskan dalam kes *Rajasegaran* bahawa pelantikan Rajasegaran adalah sah dan adalah berkemungkinan bahawa beliau juga akan memutuskan pelantikan Dr Badariah adalah sah. Selanjutnya pemohon juga menghujahkan bahawa terdapat elemen berat
E sebelah yang jelas dalam penghakiman Azmel Ma'amor HMP, seorang ahli mahkamah yang membentuk keputusan majoriti, di mana beliau merujuk kepada hal-hal luaran dalam penghakimannya semasa membuat keputusannya.

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Diputuskan, menolak permohonan tanpa perintah terhadap kos:

(1) (oleh **Zaki Azmi Ketua Hakim Negara**) Untuk permohonan ini berjaya pemohon mesti berupaya menunjukkan bahawa terdapat
G ketidakadilan dalam rekod. Budi bicara di bawah k 137 hanya boleh dilaksanakan apabila kesilapan jelas dalam rekod. Ia adalah jelas bahawa percanggahan dalam tafsiran undang-undang tidak boleh terdapat dalam rekod kerana ia adalah berkenaan pendapat, Oleh itu, walaupun terdapat penghakiman yang tidak konsisten atas isu yang sama, ia akan
H hanya boleh ditimbulkan dalam kes lain dengan isu yang sama tetapi tidak dengan menyemak semula keputusan ini. Maka walaupun terdapat percanggahan dengan panel terdahulu atas tafsiran perkara-perkara Perlembagaan yang berkenaan, ia tidak mewajarkan pengenepian penghakiman tersebut kerana jika tidak, tidak terdapat
I kesudahan kepada prosiding. Rayuan akhir akan hanya dibuka semula jika ia dapat ditunjukkan bahawa terdapat kemungkinan ketidakadilan yang ketara yang perlu dibuktikan secara jelas dan tidak terdapat alternatif yang berkesan untuk memperbetulkan ketidakadilan ini. Ia juga perlu ditunjukkan bahawa terdapat keadaan khas yang

mengakibatkan proses tersebut dicemari. Dalam kes ini tidak terdapat keperluan yang sebenar untuk prosiding-prosiding dibuka semula (lihat perenggan 12, 16 & 23). A

(2) (oleh **Zaki Azmi Ketua Hakim Negara, Gopal Sri Ram, Mohd Ghazali** dan **Tengku Baharudin Shah HHMR**) Tidak terdapat ketidakadilan prosedur dalam kes ini apabila Nik Hashim HMP, yang telah menyampaikan penghakiman Mahkamah Rayuan dalam kes *Rajasegaran* yang kemudiannya diakas oleh Mahkamah Persekutuan, dipilih sebagai ahli mahkamah yang mendengar cabaran tersebut. Tidak terdapat kepastian yang beliau akan membuat keputusan seperti mana dalam kes *Rajasegaran* kerana beliau perlu menimbangkan semula kes *Dr Badariah* berdasarkan fakta-fakta kes tersebut. Walau apa pun, undang-undang yang terpakai berkaitan dengan pelantikan Rajasegaran dan yang berkaitan dengan pelantikan Dr Badariah adalah berbeza dan kedua-dua peruntukan tersebut perlu ditafsirkan secara berasingan (lihat perenggan 30, 56–57). B C D

(3) (oleh **Gopal Sri Ram, Mohd Ghazali** dan **Tengku Baharudin Shah HHMR**) Setelah membaca penghakiman Azmel HMP secara menyeluruh ia adalah jelas bahawa beliau telah meneruskannya dengan anggapan bahawa Perlembagaan perlu menerima tafsiran yang meluas dan terbuka. Walaupun beliau ada di dalam membuat penghakimannya merujuk kepada pelantikan orang lain sebagai hakim atau pesuruhjaya penghakiman apabila mereka juga tidak layak dan menyoal mengapa pemohon tidak mencabar pelantikan tersebut, aduan bahawa pelantikan-pelantikan lain disebut adalah satu perkara yang perlu dibincang dalam prosiding lain yang dibawa oleh seseorang yang telah dimudaratkan dan bukan dalam kes ini. Dalam perkara ini pemohon tidak mengalami sebarang ketidakadilan prosedur dan pertuduhan berat sebelah tidak dibuktikan (lihat perenggan 49 & 56). E F G

(4) (per **Zaki Azmi Ketua Hakim Negara** dan **Abdul Aziz bin Mohamad HMP**) Kenyataan yang dibuat oleh Azmel HMP dengan membandingkan pelantikan Dr Badariah kepada pelantikan yang lain sebagai hakim dan pesuruhjaya kehakiman tidak memberi sumbangan terhadap keputusan sebenarnya dalam memutuskan bahawa pelantikan Dr Badariah adalah sah. Kenyataan tersebut tidak menunjukkan bahaya sebenar berat sebelah terhadap pemohon kerana kenyataan yang membincangkan kedudukan orang lain yang dibuat selepas keputusan untuk memutuskan pelantikan Dr Badariah adalah sah dan oleh itu tidak menyumbang kepada ratio decidendi beliau. Penghakiman Azmel HMP secara menyeluruh mempunyai beberapa aspek dan aspek pertama penghakiman di mana perkara penting berkenaan tafsiran perkara 123 dipertimbangkan sebagai bahagian yang penting penghakiman tersebut dan ia sahaja mencukupi bagi membuat satu H I

keputusan menentang pemohon dalam kes khas ini. Oleh itu soalan penting dalam kes ini tidak dipengaruhi oleh mana-mana berat sebelah terhadap pemohon (lihat perenggan 32 & 51)

Per incuriam: Gopal Sri Ram, Mohd Ghazali dan Tengku Baharudin Shah HHMR mengambil peluang untuk mempertimbangkan k 137 Kaedah dalam alasan-alasan penghakiman mereka dan mengemukkan keadaan-keadaan yang mana ia mungkin diperlukan. Mereka memutuskan bercanggah dengan keputusan terdahulu Mahkamah Persekutuan bahawa mahkamah ini tidak mempunyai bidang kuasa untuk menyemak keputusannya sendiri kecuali dalam alasan-alasan yang terhad. Walau bagaimanapun, subjek sama ada mahkamah ini mempunyai bidang kuasa untuk menyemak semula di bawah k 137 Kaedah bukanlah isu dalam kes ini (oleh Abdul Aziz Mohamad HMP) (lihat perenggan 53).]

Notes

For cases on bias, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 109–114.

For cases on exercise of judicial functions generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 107–142.

Cases referred to

Abdul Ghaffar bin Mohd Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771, FC (refd)

All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97, FC (refd)

Ampthill Peerage Case [1977] AC 547, HL (refd)

Asean Security Papermills Sdn Bhd v Mitsui Sumitomo Insurance (M) Bhd [2008] 2 MLJ 137, FC (refd)

Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285; [2008] 1 CLJ 521, FC (refd)

Bolivar, The AIR 1916 PC 85 (refd)

Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng [2005] 4 CLJ 29, FC (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

Chu Tak Fai v PP [2007] 1 MLJ 201, FC (refd)

Colonial Sugar Refining Co v Irving [1905] AC 362, PC (refd)

Cotton Corporation of India Ltd v United Industrial Bank Ltd AIR 1983 SC 1272 (refd)

Dato' Seri Anwar bin Ibrahim v PP [2004] 3 MLJ 517, FC (refd)

Fernandes v Ranganayakulu AIR 1953 Mad 236 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369, FC (refd)

Hunter v Chief Constable of West Midlands [1982] AC 529, HL (refd)

Lee Chow Meng v PP [1978] 2 MLJ 36, FC (refd)

Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148, HC (refd)
Quinlan v Quinlan [1901] AC 612, CA (refd)
R v Bow Street Metropolitan Stipendiary Magistrate & Ors, ex parte Pinochet Ugarte [2000] 1 AC 119, HL (refd)
Samantha Murthi v Attorney-General Malaysia & Ors [1982] 2 MLJ 126, FC (refd)
Sangram Singh v Election Tribunal AIR 1955 SC 425 (refd)
Savrimuthu v PP [1987] 2 MLJ 173, FC (refd)
Sia Cheng Soon v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753, FC (refd)
Taylor v Lawrence [2002] EWCA Civ 90, CA (not folld)
Uddin, Re [2005] 3 All ER 550, CA (refd)

Legislation referred to

Civil Procedure Rules [UK]
Code of Civil Procedure [India] s 114
Courts of Judicature Act 1964 ss 9, 61, 69(1), 81, 82, 83, 84, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102
Criminal Procedure Code
Election Offences Act 1954
Federal Constitution arts 122AB, 123, 128(1), 128(1)(a), (b), 128(2), (3), 130, 160(2)
Indian Constitution art 137
Industrial Relations Act 1967 s 23A, 23A(1)
Legal Profession Act 1976 ss 10, 30(1)
Rules of the Court of Appeal 1994 r 7
Rules of the Federal Court 1995 r 137

Robert Lazar (Tan Chong Lii with him) (Sivananthan) for the appellant.
Azizah Nawawi (Suzana Atan and Chandradevi Letchumanan with her) (Senior Federal Counsels, Attorney General's Chambers) for the respondent.

Zaki Azmi Chief Justice:

[1] This is an application under r 137 of the Rules of the Federal Court 1995, seeking to obtain leave to review the decision of this court in respect of the validity of appointment of a judicial commissioner pursuant to art 123 of the Federal Constitution. This court by a majority decision given on 27 December 2007 held that the appointment of Dr Badariah bt Sahamid as a judicial commissioner was valid. The decision was by a majority of three to two. The majority decision was delivered by Nik Hashim, Azmel and Hashim FCJJ. The minority judgment was by Abdul Hamid Mohamad CJ and Zulkefli Ahmad Makinudin FCJ.

[2] We have dismissed the application on 3 September 2008 and I now give my reasons.

[3] As a brief background, Dr Badariah was appointed a judicial commissioner of the High Court of Malaya with effect from 1 March 2007. She was a professor and a lecturer at the Law Faculty of the University of Malaya prior to her appointment. As to her academic qualification, no one disagreed that Dr Badariah is a highly qualified lady. She received a first class honours degree in law from University of Malaya on 17 June 1978. The following year, she was conferred a Masters in Law by the University of London and subsequently in 2001 she obtained a doctorate from the University of Malaya. While being a lecturer at the university, Dr Badariah sought and was admitted as an advocate and solicitor of the High Court of Malaya on 26 September 1987. She had therefore been enrolled as an advocate and solicitor of the High Court of Malaya for about 20 years. She however had never applied for a practising certificate. In other words, she had never been a practising advocate and solicitor.

[4] About four months after Dr Badariah was appointed a judicial commissioner, the applicant filed an originating summons in the High Court seeking a declaration that the appointment of Dr Badariah as a judicial commissioner of the High Court of Malaya was null and void on the ground that the said appointment contravenes art 122AB read with art 123 of the Federal Constitution. At the request of the defendant, the matter was referred to the Federal Court pursuant to s 84 of the Courts of Judicature Act 1964.

[5] The notice of motion sought the following orders pursuant to r 137 of the Rules of the Federal Court 1995 and/or under inherent jurisdiction of the powers of this court that:

(a) The majority judgments of this court pronounced on 27 December 2007 be set aside and that the special case be re-heard by this court.

(b) In the alternative, the judgment of Azmel bin Haji Ma'amor FCJ be set aside and that the special case be re-heard by this court.

(c) Such further or other relief that this court deems fit to grant in the circumstances.

[6] At the beginning of the hearing, there was a suggestion that this application also involves the question of jurisdiction ie whether this court has the jurisdiction to grant the orders sought by the applicant. Puan Azizah for the respondent conceded that this court has that jurisdiction. Therefore the question of whether the court has the jurisdiction to review under r 137 is not in issue. Furthermore, since the question of jurisdiction was never raised by

either party and therefore was not argued, in my opinion, it is not proper for this court to delve into that issue. The only question is that whether on the facts of this case, leave should be granted.

[7] In his submission before us, Mr Lazar based his application for review on three broad grounds.

(a) The majority decision given on 27 December 2007 was in error and has resulted in a serious misinterpretation of the Federal Constitution that may affect future appointments of this nature to the Bench.

(b) The empanelment of the panel hearing the special case on 22 October 2007 was unfair.

(c) There was a clear element of bias in the judgment of Azmel Haji Ma'amor FCJ.

MISINTERPRETATION

[8] I will look into the facts of this case to determine whether the order sought should be granted or not. In other words, whether the applicant has crossed the threshold or not. I am aware that I should not touch on the substantial issues at this stage.

[9] The stand taken by the Federal Court in regard to invocation of r 137 of the Rules of the Federal Court 1995 has been briefly and succinctly put by Abdul Hamid Mohamad CJ in *Asean Security Papermills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1:

> In an application for a review by this court of its own decision, *the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made*. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. *Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion*. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of review. That had been the

A practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many time warned against such attempts. …

(Emphasis added.)

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[10] The test of whether application for review under r 137 should be allowed or not is quite well found in so many cases. I therefore do not need to restate the position again.

C **[11]** Let us now analyse individually the grounds raised by the applicant. The applicant contends that the majority decision given on 27 December 2007 was in error and according to counsel that has resulted in a serious misinterpretation of the Federal Constitution that may affect future appointments of this nature to the bench. Counsel for the applicant sought D review, according to him, to prevent injustice. But what is justice? I have attempted to discuss it in *Asean Security Papermills*. Is it injustice because the applicant does not agree with the decision of the court? If I understand him correctly, his contention is that there was injustice because according to him, there is a conflict in the decision in this case and the case of *All Malayan* E *Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97. That was a decision declaring that a person who has been called to the Bar but had not practised is not qualified to be an industrial court judge. It was based on the interpretation of s 23A(1) of the Industrial Relations Act 1967 (Act 177).

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[12] Before the application can succeed, he must be able to show on the face of the record that there was injustice. That error must be obvious on the face of the record. It should be able to be seen just by reading the record that there was an error which obviously was an injustice. In *Asean Security* G *Papermills* case, I have listed out the circumstances where discretion under r 137 can be exercised. If one were to go through all these cases, injustice could be clearly seen even before going into the merits of each case. It cannot apply where a decision of this court is only questioned, whether in law or on the facts of the case. This principle is well spelt out in the case cited below.

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[13] In *Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 4 CLJ 29 at p 45, Abdul Hamid Mohamad FCJ (as he then was) said this:

I … It has been seen that the applicant questions the findings of this court both in law and on facts. These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision. Similarly, regarding the interpretation and application of some provisions of the Companies Act 1965, even if we disagree with the earlier panel (again we do not say whether we agree or disagree) that does not warrant us to set aside the judgment and the

order of the earlier panel of this court and re-hear and review the appeal. Otherwise, as has been said, there would be no end to a proceeding. A

[14] In *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201 at p 212, Nik Hashim FCJ defines injustice as: B

> ... (i) a lack of fairness or justice or; (ii) an unjust act. Whether an act is unjust or not is a question of law, and in this case, it must depend on the determination of whether the failure of the chemist to specify the weight of the samples he used in the analysis of the drug in question is unjust so as to cause an injustice to the applicant or an abuse of process of the court which needs to be rectified. C

[15] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 3 MLJ 517 at p 530, this court also said:

> The Federal Court would exercise its power of review for the purpose of rectifying a mistake which had crept in by misprision in embodying the judgments, or had been introduced through inadvertence in the details of the judgment. D

[16] Before us, counsel for the applicant could only say that the Federal Court had misinterpreted the arts 123 and 122AB of the Federal Constitution. He based his argument on the grounds that in *Rajasegaran*'s case, the Federal Court had ruled contrary to the manner it had done in respect of this case. He argued that the contradiction in interpretation has resulted in an illogical situation. According to him, while a person is qualified to become a judicial commissioner, the same person is not qualified to become a judge of the industrial court. It is quite obvious that the jurisdiction conferred upon the judge of the industrial court is much less than that conferred on a judicial commissioner. To him this is injustice. E F

As I had said earlier, in order for an applicant to succeed, he must show that the error is patent on the face of the record. It is inherently obvious that disagreement in interpretation of law cannot appear on the face of the record. After all, it is a matter of opinion. Each would have his own opinion. In most cases, as in this, it is impossible to say that the finding of law is wrong. Even if there are contradictions in interpretations, it is not a case for review. It could be, as the learned Chief Justice said, 'taken up in another appeal in a similar case'. Even if there are inconsistent judgments on the same issue, it can only be raised in another case with similar issues but not by reviewing this decision. It does not prevent a similar issue being raised in another case bearing similar facts. The error alleged to have been committed here is that a person who has been called to the Bar and yet did not practice should not qualify to be a judicial commissioner. G H I

[17] The affidavit filed on behalf of the applicant provided the curriculum vitae of Dr Badariah showing her qualification. From that curriculum vitae there is no doubt that academically she is more than qualified to decide as a judge. But the question that had to be decided by the Federal Court was whether she is qualified by virtue of art 122AB read with art 123 of the Federal Constitution as was put by the learned Chief Justice in the decision which is now impugned. The issue before the court is one of law. The simple issue is whether she is under the Federal Constitution qualified to be a judicial commissioner.

[18] What the Federal Court had done was to give an interpretation to the relevant provisions of the Federal Constitution. Suffice for me to again cite the authority of *Chan Yock Cher v Chan Teong Peng* in particular the judgment of the current learned Chief Justice who was then a Federal Court judge. In his grounds of judgment, he said (at p 35):

> From the grounds listed by the applicant, it can be seen that the applicant is questioning the correctness of the judgment in law and on facts. In other words, the applicant is questioning the judgment on merits. Questioned by the court at the beginning of his submission learned counsel for the applicant admitted that he was not challenging the validity of the constitution of the court that heard the appeal. In fact, he admitted that he was challenging the correctness of the judgment on merits. In fact, whether he admits it or not, that is our view.

[19] Later on, at p 45, he said:

> The reasons have been amply stated by this court in *Adorna Properties Sdn Bhd* with which we fully agree. The only other reason we would like to add is that to freely allow previous orders to be reviewed would lead to 'panel shopping'. An unsuccessful party in an appeal may try its luck before another panel that may disagree with the view of the earlier panel. If he is successful in having the order reversed, the other party will do the same thing again. Certainly, we would not like to see this apex court becoming a circus that repeats the same show again and again.

[20] I do not see any difference in regard to arguments in *Chan Yock Che*r and this case. From the argument put by learned counsel, I find that his contention is that the decision arrived at by the Court of Appeal was wrong in law. He gave his reasons mentioned earlier why he said the Federal Court could be also wrong in law. But to me and to quote the words of the learned Chief Justice, '*These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision*'.

[21] And in the context of this case, even if we disagree with the earlier panel on the interpretation of the relevant articles of the Federal Constitution, it does not warrant us to set aside the judgment for otherwise there is no end to the proceedings.

[22] In England there arose a question of whether the Court of Appeal there had the discretion to re-open an appeal which has been finally determined. The application was heard and determined by a panel of five judges in the Court of Appeal consisting of Lord Woolf CJ, Lord Phillips of Worth Matravers MR, Ward, Brooke and Chadwick LJJ.

[23] That case *Taylor v Lawrence* [2002] EWCA Civ 90 laid down the principle that final appeal will only be re-opened if it can be shown that there was a probability of a significant injustice which must be clearly established and that there was no effective alternative remedy to correct this injustice. It must be shown that the trial or the appeal has been critically undermined. The jurisdiction is not solely concerned with the case where the earlier process has or may have produced a wrong result. It must also be shown that there was special circumstances which resulted in the process having been corrupted. In short, the purpose is to correct the injustice. This principle laid down by *Taylor v Lawrence* was later incorporated as a rule in the Civil Procedure Rules ('the CPR') 52.17 headed reopening of final appeals. That rule provides that:

> The Court of Appeal or the High Court will not reopen a final determination of any appeal unless — (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy.

[24] It was said in *Re Uddin* [2005] 3 All ER 550 that it is one thing to re-litigate an issue where the vehicle for doing so is the very same set of proceedings in which the issue had earlier been concluded. It is quite another to bring a fresh action to impugn an earlier judgment. To allow a final appeal to be reopened can also create injustice to the successful party. In *Taylor v Lawrence*, this is what the Court of Appeal said:

> [54] ... The residual jurisdiction which we are satisfied is vested in a Court of Appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for that to happen.

A [55] One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court
B in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will
C also be important considerations ...

[25] Even applying the principle that was laid in *Taylor v Lawrence*, the applicant have not shown that it has satisfied the conditions laid down in that case.

D

[26] In regard to arguments in *Chan Yoke Cher* and this case, from the argument put by learned counsel, I find that his contention is that the decision arrived at by the Court of Appeal was wrong in law. He gave his reasons mentioned earlier why he said the Federal Court could be wrong in
E law. But to me, and to quote the words of the learned Chief Justice, 'These are matters of opinion. Just because we may disagree (we do not say whether we agree or disagree with such findings) with the earlier panel of this court, that is not a ground that warrants us to review the decision'.

F

[27] And in the context of this case, even if we disagree with the earlier panel on the interpretation of the relevant articles of the Federal Constitution, that does not warrant us to set aside the judgment for otherwise there is no end of the proceedings.

G

[28] In the light of that the first ground lacks merit and must necessarily fail.

EMPANELMENT

H

[29] According to Mr Lazar, Nik Hashim FCJ should not have been empanelled to sit on the impugned appeal because he had held in *Rajasegaran*'s case that Rajasegaran's appointment as an industrial court judge was valid. In other words, if Nik Hashim FCJ had decided in *Rajasegaran* that
I Rajasegaran's appointment is valid, then he is likely to also decide that Dr Badariah's appointment is valid. I do not see any validity in this argument. Every judge has his own views on certain matters but he is always open to hear submissions otherwise. After hearing the submission, he may hold on to his views or may decide otherwise. There was no assurance that he would

have decided in the same way he did in *Rajasegaran*'s case. He would have to reconsider *Dr Badariah*'s case on the facts of the case.

[30] In any case, the applicable laws relating to the appointment of Rajasegaran and that relating to the appointment of Dr Badariah are different. The two provisions have to be construed separately. There was no assurance that Nik Hashim FCJ would have arrived at the same conclusion that he did in *Rajasegaran*'s case.

BIAS

[31] The applicant asked us to hold that the statements by Azmel FCJ were unwarranted, disparaging and unjustified, and also not essential or relevant in determining the case. They say this shows a real danger of bias against the applicant. This contention is made based on statements by the learned judge comparing the appointment of Dr Badariah to the appointment of Yaakob Ismail J, Syed Ahmad Idid J and Rohana Yusof J who were all, preceding their appointments as judicial commissioners, employed by Petroliam Nasional Bhd, Public Bank Bhd and Bank Negara respectively. Also discussed by the judge in his judgment was the appointment of Dr Visu Sinnadurai who was a commissioner of law revision and prior to that was a professor at the Law Faculty at the University of Malaya. Although he was called to the Bar, he could not have been practicing since he was holding permanent jobs. In other words, Azmel FCJ was comparing the position of Dr Badariah to that of Dr Visu Sinnadurai.

[32] I dare say that two wrongs cannot make one right. The fact that the appointment of Dr Visu could have been wrongly made may be argued that it cannot make Dr Badariah's appointment right. In my opinion however, these statements by the learned judge do not contribute towards his actual decision in holding that Dr Badariah's appointment is valid. He had made a decision to hold Dr Badariah's appointment valid before discussing the positions of these four judges. They do not contribute towards his ratio decidendi.

[33] The applicant asked us to consider these statements as well as other statements in judgment that the judge was bias. In my opinion these statements by the learned judge cannot be construed as bias.

[34] In the light of that, we have no alternative but to dismiss this application. We decided to make no order as to costs and any deposit made shall be refunded to the applicant.

Abdul Aziz Mohamad FCJ:

[35] By art 122AB of the Federal Constitution, the qualification for appointment as a judicial commissioner is the same as that for appointment as a judge of a High Court. By art 123, a person is qualified for appointment as a judge of a High Court if he is a citizen and if 'for the ten years preceding his appointment he has been' one of two things, the one being an 'advocate' of the Federal Court, the Court of Appeal or the High Courts or any of those courts.

[36] Dr Badariah bt Sahamid was appointed judicial commissioner on 1 March 2007. For the ten years preceding her appointment she was an 'advocate and solicitor' of the High Court in Malaya, having been admitted as such on 26 September 1987 under s 10 of the Legal Profession Act 1976. But she did not have a practising certificate and was not, in those ten years, practising as an advocate and solicitor. She was teaching law at the University of Malaya.

[37] The Malaysian Bar, being of the view that the word 'advocate' in art 123, para (b), means a practising advocate, sought from the High Court a declaration that the appointment of Dr Badariah as judicial commissioner was null and void as contravening art 123. The matter came before this court from the High Court as a special case by way of a reference of a constitutional question under s 84 of the Courts of Judicature Act 1964 at the instance of the defendant government. The question was, to put it simply, whether the word 'advocate' in art 123 means a person who actually practises as an advocate. On the answer to that question depended the validity or otherwise of Dr Badariah's appointment.

[38] On 22 December 2007 this court (Abdul Hamid Mohamad CJ, Nik Hashim Ab Rahman, Hashim Yusoff, Azmel Maamor, Zulkefli Makinudin FCJJ) decided in effect that the word 'advocate' in art 123 does not necessarily mean a practising advocate and that therefore the appointment of Dr Badariah was valid. It was a majority decision, Abdul Hamid Mohamad CJ and Zulkefli Makinudin FCJ dissenting.

[39] The motion before us, which we unanimously dismissed on 3 September 2008, without hearing the respondent government, was brought by the Malaysian Bar on 21 March 2008 pursuant to r 137 of the Rules of the Federal Court 1995. It sought a review of this court's majority judgment of 22 December 2007 with the aim of having the special case reheard by another panel of this court. The Bar were of the view that the majority judgment was erroneous.

[40] In *Chan Yock Cher v Chan Teong Peng*, this court held that r 137 is a reaffirmation of this court's inherent powers, in the words of the rule, 'to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court', to the extent even of reviewing its own decision. According to the rule, the inherent powers reflected in it are to be exercised only for the purpose of preventing an injustice or an abuse of the process of the court. According to the motion before us, it was in order to prevent an injustice that the Bar sought a review of the judgment of this court of 22 December 2007.

[41] Were it not for the potential risk posed by the motion, that decision of this court, being that of the apex court, would be final as regards the position of Dr Badariah and she could therefore rest assured that her position was no longer assailable. Abdul Hamid Mohamad CJ said in his judgment that academically she was definitely one of the most qualified persons to be appointed judicial commissioner, if not the most qualified. And Azmel Maamor FCJ in his judgment said that her qualification in the law was impeccable and that the Bar's counsel admitted that the Bar had no complaints about her qualification in the law. For it to be said that the majority decision of this court which confirmed that her appointment was valid would be an injustice, it must be shown that someone would suffer an injustice — would feel the pangs of injustice — by her appointment, but, in view of what had been acknowledged about her qualification, I was unable to see who would suffer an injustice by her appointment. So I put the question to learned counsel for the Bar.

[42] The answer given by learned counsel for the Bar had to do with this court's decision in *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97. It was about the appointment of a chairman of the industrial court under s 23A(1) of the Industrial Relations Act 1967, which lays down the requirement of having been, for the seven years preceding appointment, 'an advocate and solicitor within the meaning of the Legal Profession Act 1976'. This court construed it to mean an advocate and solicitor who has been in practice. Learned counsel for the Bar's answer was that, so long as the decision of this court in *Dr Badariah*'s case stands, it would create a situation whereby to be appointed a chairman of the industrial court a person would have to be in practice for the required number of years whereas to be appointed a judge of a High Court or a judicial commissioner, an advocate need not be in practice for the required number of years, and the injustice would lie in such a situation. I was unable to agree that such a situation amounts to an injustice that would merit the exercise of this court's powers under r 137. It was mainly for that reason that I decided that the motion ought to be dismissed. It simply did not qualify under r 137.

[43] Although that was how the Bar founded their claim of injustice, it was not the approach of the Bar that if this court agreed with the claim, then it should follow, without more ado, that the judgment of this court of 22 December 2007 should be set aside and the special case be reheard by another panel. The Bar also took upon themselves the burden of showing either one of two things to justify their plea that the judgment be set aside.

[44] The Bar sought to show, firstly, that there was unfairness in the selection of the panel for the special case. In their affidavit and written submission they argued that since the appointment of Dr Badariah had involved consultation with the Chief Justice by the Prime Minister, it would have been preferable that the empanelling be done by the President of the Court of Appeal under s 9 of the Courts of Judicature Act 1964, although the Bar accepted that the Chief Justice was not, by reason of his involvement in the appointment of Dr Badariah, disqualified from empanelling the court. To persuade us of unfairness in the selection of the panel, the Bar added the fact that Nik Hashim FCJ was the judge who wrote the judgment of the Court of Appeal in the *Rajasegaran* case that I have mentioned, which had ruled that the words 'advocate and solicitor' in s 23A(1) of the Industrial Relations Act 1967 do not necessarily mean an advocate and solicitor in active practice, and the fact that none of the judges of this court who disagreed with the Court of Appeal was chosen to be in the panel for the special case of Dr Badariah.

[45] In his oral submission, however, the Bar's counsel seemed in the end to reduce the scope of the matter of alleged unfairness in the selection of the panel and to focus only on the selection of Nik Hashim FCJ, so that I formed the understanding that the aim of the Bar now was to cast doubt on the validity of his judgment in the special case, thereby rendering the remaining judgments a tie and meriting a rehearing of the special case. I was unable to see how Nik Hashim FCJ's judgment could be vitiated since the Bar in their affidavit accepted that the fact that he had formed the view that he did on a matter of law in the *Rajasegaran* case did not disqualify him from sitting in the panel for the special case.

[46] I ought to mention that in their affidavit the Bar did, in relation to the selection of Nik Hashim FCJ, contend that the selection of the panel was unfair. I quote their para 14:

> The fact that YA Dato' Bentara Istana Nik Hashim Nik Ab Rahman FCJ had formed a view in the *Rajasegaran* case on a matter of law did not, in law, disqualify him from sitting in that panel. However, the fact that none of the judges who sat in the *Rajasegaran* case in the Federal Court who had formed an opinion contrary to that held by YA Dato' Bentara Istana Nik Hashim Nik Ab Rahman FCJ were selected, clearly illustrates the unfairness in the selection of the 22 October 2007 special case panel.

[47] The thinking of the Bar seemed to be that while the selection of Nik Hashim FCJ could not be questioned, nevertheless since he had in the Court of Appeal formed an opinion in the *Rajasegaran* case which was disapproved by this court, then for a fair selection of the panel of this court for the special case one or more of the judges in the panel for the *Rajasegaran* case should also have been selected to the panel for the special case. In my judgment, if that had been done, the selection of the panel might also been seen to be unfair as designed to ensure that the special case was decided along the same lines as the *Rajasegaran* case was decided.

[48] Alternatively, the Bar sought to show that Azmel FCJ was biased against the Bar, so that his judgment ought to be set aside, leaving a tie judgment of this court, thus necessitating a rehearing of the special case.

[49] Reading Azmel FCJ's judgment as a whole, it seemed to me that there were three facets to it. He first of all agreed with the views of Hashim Yusoff FCJ that as a matter of interpretation of a word in a constitution, the word 'advocate' in art 123 does not necessarily mean a practising advocate. He supported those views with a consideration of principles of constitutional interpretation and of the difference that he saw between the interpretation of the terms 'advocate and solicitor' and 'advocate' in two decisions of this court, namely, those in *Samantha Murthi v Attorney-General Malaysia & Ors* [1982] 2 MLJ 126 and in *Rajasegaran*, of which he preferred to follow *Samantha Murthi*. That was the interpretive part of the judgment, and the essential part. But as an adjunct or a corollary to it, he went on to consider the undesirability of interpreting art 123 so as to ensure the appointment of persons with 'really appropriate and proper' qualifications, in that it would open to question the validity of past appointments of certain other judges, whose appointments the appointing authorities considered satisfied art 123 and nobody objected to. The case of Dr Visu Sinnadurai, who had left the judiciary, was particularly dwelt on. Azmel Maamor FCJ was perfectly entitled as a judge to hold the views that he did in those two facets of his judgment, be they sound or otherwise. The Bar's allegation of bias was directed at the third facet of the judgment which related to or arose from the second facet and which appeared to amount to an expression of displeasure at the Bar for having brought proceedings to invalidate Dr Badariah's appointment, whereas they had not objected to the appointment of Dr Visu Sinnadurai. Azmel Maamor FCJ said that it was 'certainly most unconscionable on the part of the Bar to practice a double standard'.

[50] In his oral submission, learned counsel for the Bar fastened upon something that Azmel Maamor FCJ said. The learned judge was referring to the fact that Dr Visu Sinnadurai was not practicing law but was gainfully employed by the University of Malaya and as the Commissioner for Law

Revision during the ten years preceding his appointment and saying that because he was gainfully employed he could not, in view of s 30(1) of the Legal Profession Act 1976, have been issued with a practising certificate to enable him to practice. What learned counsel for the Bar fastened upon was the further statement that if the Bar Council had issued a practising certificate to Dr Visu, it would have been fraudulent. But I thought that was neither here nor there because what was said was about something that did not happen. As no practising certificate was issued to Dr Visu Sinnadurai, Azmel Maamor J could not have actually thought that the Bar Council had practised fraud.

[51] I was of the view that Azmel Maamor FCJ's exasperation arose as a result of his views in the first two facets to his judgment and that it was not the case that those views were influenced by his exasperation. The first facet of the judgment, where the essential matter of interpretation of art 123 was considered, was the essential part of the judgment and that alone would have been sufficient for a decision against the Bar on the special case. I entertained no doubt the Azmel Maamor FCJ would have arrived at his decision on the essential question in any event and that the decision was not influenced by any bias against the Bar.

[52] The Bar therefore failed to show what they sought to show to justify their plea that the judgment of this court of 22 December 2007 be set aside. That was my secondary reason for dismissing their motion.

[53] Gopal Sri Ram, Mohd Ghazali Yusoff and Tengku Baharudin Shah JJCA have in their grounds of judgment taken the opportunity to consider r 137. They have set out the circumstances in which it may be resorted to. They conclude, contrary to previous decisions of this court, that this court has no inherent jurisdiction to review its own decisions except on very limited grounds. This was not a subject that came up for decision on the motion before us or that had been debated in the hearing before us. I therefore do not feel myself called upon to lend my voice to it.

Gopal Sri Ram, Mohd Ghazali and Tengku Baharudin Shah JJCA:

[54] Dr Badariah Sahamid is a judicial commissioner of the High Court in Malaya. She was, until her appointment, a lecturer at the Faculty of Law of the University of Malaya. She was admitted to the bar of West Malaysia in 1987. The Bar Council took out a summons seeking a declaration that Dr Badariah's appointment was unconstitutional and a nullity. The same result could have been achieved by moving for relief in the nature of a writ of quo warranto. Today either quo warranto or declaratory relief are available to challenge the appointments made under the Constitution or other written

law (see *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148). In accordance with the leap-frog procedure under s 84 of the Courts of Judicature Act 1964 giving effect to the referral jurisdiction conferred by art 128(2) of the Federal Constitution, the High Court referred the challenge to this court. After hearing argument, this court in a reserved decision, by a majority, held that Dr Badariah's appointment was valid. The case is reported in *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521. The council has now moved this court to review that decision. This court heard the motion to review on 3 September 2008 and dismissed it without calling upon learned senior federal counsel to respond. Our reasons for the decision are now produced.

[55] Learned counsel when seeking the review relied on several grounds. His first ground is that Azmel Haji Maamor FCJ a member of the court forming the majority, had adverted to extraneous matters in his judgment when coming to his conclusion. His judgment was therefore tainted with bias. It follows that his participation in the decision making process must be excluded altogether thereby depriving this court of the required coram. The decision should therefore be set aside and the matter remitted to a fresh panel of judges to hear it on its merits once again.

[56] Having read and re-read the judgment of Azmel FCJ, we are unable to conclude that there was either any bias within the meaning of that concept as fairly worked out in the decided cases. Reading the judgment of Azmel FCJ as a whole, it is clear that he proceeded along the lines that the Constitution should receive a wide and liberal interpretation. He did in the course of his judgment advert to the appointments of other persons as judges or commissioners when they also did not qualify and questioned why the council had not challenged such appointments. But when read as a whole we are satisfied that allegation of bias was not made out. In short, the council suffered no procedural injustice. We may add that the complaint that other appointees were mentioned in the judgment under discussion is a matter that must be addressed in other proceedings brought by the persons adversely affected and not in the present.

[57] As regards the second ground, this has to do with the decision of the former Chief Justice Ahmad Fairuz to empanel Nik Hashim FCJ as a member of this court hearing the challenge. The submission here is as follows. Chief Justice Ahmad Fairuz was under a duty to act fairly when he empanelled the judges to hear the appeal herein. The council had written to the Chief Justice not to appoint Nik Hashim FCJ as he had produced the judgment of the Court of Appeal which was reversed by this court in *All Malayan Estates Staff Union v Rajasegaran*. That was a case in which the Court of Appeal in a

judgment delivered by Nik Hashim JCA (as he then was) held that to qualify for appointment as a chairman of the industrial court under s 23A of the Industrial Relations Act 1967 the proposed appointee need not have held a practising certificate. As such, this is a view with which he must have held when he sat to hear the council's appeal in this matter. We are in agreement with learned counsel's submission that Chief Justice Ahmad Fairuz was under a duty to act fairly when exercising his administrative powers under the Courts of Judicature Act 1964. As Lord President Salleh Abas said in *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173 at p 176:

> … public interest, reason, and sense of justice demand that any statutory power must be exercised reasonably and with due consideration.

However, we are, with respect, unable to accept the argument that the learned Chief Justice acted unfairly. In the first place, this court had reversed the Court of Appeal in *Rajasegaran* on the point. It is plain that Nik Hashim FCJ, when faced with the reversal of his view, was, in adherence with judicial discipline, bound by it as a matter of pure precedent when the present fact pattern came before him. Further, the statutory provision under consideration in *Rajasegaran* is different from the one that came up for consideration in this case. In these circumstances it cannot be said that the Chief Justice had acted unfairly in empanelling Nik Hashim FCJ. There was accordingly no procedural injustice in this case.

[58] The third point taken by learned counsel is that Chief Justice Ahmad Fairuz ought not to have empanelled the court that heard the challenge because in effect it was his decision to appoint Dr Badariah as a judicial commissioner. Although His Majesty the Yang Di Pertuan Agong made the appointment on the advice of the Prime Minister acting in consultation with the Chief Justice in practice it is the Chief Justice who recommends the particular person for appointment. As such he had an interest in the outcome of the matter. He was therefore not in a position to act within the terms of s 9 of the Courts of Judicature Act 1964. He ought therefore to have asked the President of the Court of Appeal to exercise the empanelling power. With respect we are unable to agree. Where the exercise of a power by a public decision maker is challenged on the ground of procedural injustice — and this is such a case — the applicant must demonstrate that the wrongful exercise of the power in the sense just discussed has produced 'injustice in a broad and general sense' (see *Sangram Singh v Election Tribunal* AIR 1955 SC 425 at p 429; *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369. We would add that although *Sangram Singh* was a case that concerned the remedy of certiorari the observations there made apply with equal force to the remedy of declaration as both are essentially discretionary in nature. Even assuming that the Chief Justice had acted unfairly in empanelling the court, the requirement of injustice in a broad and

general sense is absent here. In the first place, there were two powerful dissents. In the second place, if it is the council's case that a differently constituted court would have found for it then that amounts to saying that a litigant is entitled to choose his judges which is of course wholly unacceptable.

[59] The very narrow grounds on which this court may review its decision have been recently set out in the judgment of Abdul Hamid CJ Malaysia in *Asean Security Papermills Sdn Bhd v Mitsui Sumitomo Insurance (M) Bhd* [2008] 2 MLJ 137 as follows:

> However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused. I have no difficulty in accepting that inherent jurisdiction may be exercised in the following instances:
>
> First, where there is a lack of quorum as in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 where two of the presiding judges had retired at the time when the judgment was delivered and only one judge remaining who was capable of exercising his functions as a judge of that court.
>
> Secondly, where the decision had been obtained by fraud or suppression of material evidence as in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673.
>
> Thirdly, where there is a clear infringement of statutory law. In this respect, a clear example would be where the court has mistakenly applied a repealed law. But, where it is a matter of interpretation or application of the law, it is in my view not a suitable case for a review. The judgment of this court is *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 CLJ 565 does throw some light in this respect.
>
> Fourthly, where application for review has not been heard by this court but, through no fault of the applicant, an order was inadvertently made as if he has been heard as in *Raja Prithwi Chand Lal Choudhury v Sukraj Rai & ors* AIR 1941 FC 1.
>
> Fifthly, where bias has been established as in *Taylor & Anor v Lawrence & Anor* [2002] 2 All ER 353.
>
> Of course, there may be other circumstances. But, the review jurisdiction should never be allowed to be used to question a finding of this court in an appeal on question of facts.

Pausing for a moment it may be seen that the common thread that runs through all the instances mentioned by the Chief Justice is that in each of them the affected party had suffered procedural injustice: not substantive injustice.

[60] Learned counsel submitted that his case came within one or more of the categories adverted to by the learned Chief Justice. For the reasons already given we do not agree. This is not a case in which the council has suffered procedural injustice.

[61] Before we conclude, there is a point of considerable importance that we strongly feel must be addressed. It has to do with the jurisdiction of this court to review its own decisions. We are aware that the jurisdiction point was conceded — and wrongly so — by learned senior federal counsel. According to her there is a line of authority that has declared the existence of the review jurisdiction. In the course of this judgment we shall attempt to demonstrate that the jurisdiction contended for does not exist and that the cases that declare the existence of the jurisdiction were wrongly decided and should be overruled. We may add that if this court has no jurisdiction then the concession of the senior federal counsel or an agreement between her and the appellant's counsel does nothing to confer jurisdiction. Consent cannot confer jurisdiction where none exists (see *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 and the cases therein discussed).

[62] The starting point is to identify the sources from which this court derives its jurisdiction. In our judgment there are three. First, the Federal Constitution; second, Acts of Parliament; third, the common law. Let us take the Constitution. Articles 128 and 130 are the relevant provisions. They read as follows:

> 128(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction —
>
> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
>
> (b) disputes on any other question between States or between the Federation and any State.
>
> (2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

(3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

130 The Yang di-Pertuan Agong may refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise, and the Federal Court shall pronounce in open court its opinion on any question so referred to it.

[63] As may be seen, this court has four distinct kinds of jurisdiction conferred upon it by the Constitution. First, there is the original jurisdiction in the circumstances set out under cll (a) and (b) to art 128(1). Second there is the referral jurisdiction in the circumstances appearing in art 128(2). Third, there is the appellate jurisdiction set out in art 128(3) which is such as may be provided by federal law. And fourth, there is the advisory jurisdiction under art 130. It is significant that there is no mention of any review jurisdiction. Contrast this with art 137 of the Indian Constitution which expressly confers on the Supreme Court of that country jurisdiction to review its own decisions. It follows that the Constitution is not a source of the review jurisdiction.

[64] Taking a moment aside, we note that the expression used by art 128(3) is 'federal law' in relation to this court's appellate jurisdiction. This is defined by art 160(2) as follows:

Federal law means —

(a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and

(b) any Act of Parliament.

Put shortly, federal law means any pre-Merdeka law and any Act of Parliament. You will notice that the definition is not open-ended. It is fixed. It says 'federal law means'. It follows that it is not open for a court to include any other written law within the definition. So, rules of court made under the Courts of Judicature Act are, by constitutional definition not federal law. The contrary view expressed in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2004] 3 MLJ 517 is therefore, with great respect, clearly not correct.

[65] We turn next to the second source of this court's jurisdiction, namely Acts of Parliament. Principal amongst these is the Courts of Judicature Act 1964 which in ss 81 to 83 deals with the original jurisdiction, in s 94 with the referral jurisdiction (which is placed under the heading of the original jurisdiction) and in ss 86 to 102 with the appellate jurisdiction. Again, there is no reference to any jurisdiction to review. Other Acts, for example the

Criminal Procedure Code in habeas corpus cases and the Election Offences Act 1954 provide for leap-frog appeals to this court. But there is no statute that confers jurisdiction upon this court to review its own decisions. Compare this with s 114 of the Indian Code of Civil Procedure which expressly confers power on a court to review its own decisions in certain circumstances. So, statute is also not a source of the review jurisdiction.

[66] Last, the common law jurisdiction. At common law, every court has an inherent jurisdiction to hear applications, make such orders and give such directions for the advancement of justice and to prevent an abuse of its process. And that brings us to r 137 of the Rules of the Federal Court upon which reliance has consistently been placed to exercise the review jurisdiction. The rule reads as follows:

> 137 For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[67] It has been repeatedly said that the rule does not confer any new jurisdiction but is merely declaratory of the jurisdiction inherent in it at common law. It has also been held that resort to the inherent jurisdiction cannot be had in the face of express statutory provisions (see *Cotton Corporation of India Ltd v United Industrial Bank Ltd* AIR 1983 SC 1272). In *Hunter v Chief Constable of West Midlands* [1982] AC 529, Lord Diplock described inherent jurisdiction as something.

> which any court of justice must possess to prevent *misuse* of its *procedure* in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

[68] Sir Jack Jacob in his article '*The Inherent Jurisdiction of the Court*' [1970] Current Legal Problems 23, makes the following observation with which we are in agreement:

> Perhaps the true nature of the inherent jurisdiction of the court is not a simple one but is to be found in a complex of a number of features, some of which may be summarised as follows:
>
> (1) The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation.

(2) The distinctive and basic feature of the inherent jurisdiction of the court is that it is exercisable by summary process, ie, without a plenary trial conducted in the normal or ordinary way, and generally without waiting for the trial or for the outcome of any pending or other proceeding.

(3) Because it is part of the machinery of justice, the inherent jurisdiction of the court may be invoked not only in relation to the litigant parties in pending proceedings, but in relation also to anyone, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties.

(4) The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

(5) The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are rules of court governing the circumstances of such case. The powers conferred by rules of court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

[69] It is important to note that the inherent jurisdiction of a court forms part of procedural and not substantive law. Hence, the right of a litigant to appeal is a substantive right (see *Colonial Sugar Refining Co v Irving* [1905] AC 362) and must be conferred by statute as 'no court has an inherent appellate jurisdiction and that a dissatisfied person may appeal if, and only if, statute so provides' (per Suffian LP in *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36). The same is true of the jurisdiction of a court to act in revision. We may add that this court has now held that r 137 cannot be prayed in aid to assume jurisdiction over matters that originate in a subordinate court so that the Court of Appeal is the final court in respect such matters (see *Sia Cheng Soon v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; *Abdul Ghaffar bin Mohd Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771. It is clear from the judgments in those cases that r 137 may not be resorted to in the face of an express statutory provision and that this court has no jurisdiction save that conferred by the Constitution and by federal law.

[70] The question that therefore arises is whether the power of a court to review its own judgment is a common law power under the inherent jurisdiction. In our judgment this is a matter of classification. And courts have classified the jurisdiction of a court to review its own decisions as statutory. Just as has been done with appellate and reversionary jurisdiction. In short, the inherent jurisdiction of any court does not include a power to review its decisions. In *Fernandes v Ranganayakulu* AIR 1953 Mad 236, Ramaswami J said:

> So far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power of a judicial officer but such a right must be conferred by Statute. This is based upon the common sense principle that prima facie a party who has obtained a. decision is entitled to keep it unassailed unless the Legislature has indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. Therefore, the course of decisions in this country has been to the effect that a right to review is not an inherent power: see — *David Nadar v Manicka Vachaka Desika Gnana Sambanda Pandara Sannathi* AIR 33 Mad 65; *Prayag Lal v Jai Narayan Singh* AIR 22 Cal 419; *Baijnath Ram Goenka v Nand Kumar* AIR 34 Cal 677 and *Anantharaju Shetty v Appu Hegade* [1919] 37 MLJ 162.

[71] So when may r 137 be resorted to? The answer in our respectful view is that it may be resorted to only in cases where a procedural injustice has been occasioned. Illustrations abound. Take the case of an application for leave to appeal or of an application for stay pending leave. It may transpire that leave ought not only to be granted but that the decision appealed against is so obviously wrong that the matter must be dealt with speedily. In such a case to insist that the two stage process of leave followed by the substantive hearing be adhered to may incur unnecessary costs, cause delay and result in injustice to the appellant. It is then open to this court to treat the application for leave or stay as the appeal proper and to proceed with it. Again, where this court proceeds to make an order in the mistaken belief that the litigant against whom it is made was absent without cause, it may set the same aside upon proof that the notice of hearing was never served or received by him. So, in *The Bolivar* AIR 1916 PC 85, Lord Parker of Waddington said:

> Where substantial injustice would otherwise result, the court has, in Their Lordships' opinion, an inherent power to set aside its own judgments of condemnation so as to let in bona fide claims by parties who have not in fact been heard, and who have had no opportunity of appearing. This power is discretionary, and should not be exercised except where there would be substantial injustice if the decree in question were allowed to stand, and where the application for relief has been promptly made.

[72] So too, where this court grants leave to appeal and later forms the view that leave ought not to have been granted, it may rescind and discharge the order granting leave. This is what happened in *Quinlan v Quinlan* [1901] AC 612. Other examples of procedural injustice are given in the judgment of the Chief Justice in the *Asean Security Paper Mills* case referred to earlier in this judgment.

[73] That brings us to the decision of the Court of Appeal in *Taylor v Lawrence* [2003] QB 528, a case repeatedly relied upon by previous decisions of this court to assert an inherent power to review its own decisions. The facts of that case are of critical importance to place in context the observations of Lord Woolf CJ made in relation the court's jurisdiction to re-open an appeal that had been heard and decided on its merits. We will refer to that learned Lord Chief Justice's observations later. But first the facts. There was a boundary dispute between the parties. It came before the county court presided over by His Honour Peter Goldstone, sitting as a deputy circuit judge. The appellants were unrepresented. The respondents were. They had counsel and solicitors. At the commencement of the trial, the judge informed the parties that he had been a client of the respondents' solicitors. However, he said that it had been 'many years' since he had last instructed them. The parties did not object to the judge trying the case. At the conclusion of the trial the judge entered judgment for the respondents. The appellants appealed to the Court of Appeal. One of the grounds of appeal advanced was that there was an appearance of bias because of the judge's relationship with the respondent's solicitors. The appellants were permitted to show that that the trial judge and his wife had in fact used the services of the respondent's solicitors the very night before judgment was given against the appellants to amend their wills. In response, at the appeal, the judge provided further information about his involvement with the solicitors in question. The appeal was dismissed. Later, the appellants, by unfair means, (described by Lord Woolf CJ as 'disgraceful' and 'discreditable') obtained information that the trial judge did not pay for the services provided by the solicitors. It followed that the judge had received a financial benefit from the respondents' solicitors when he gave judgment. This fact was never disclosed by the judge although he had the opportunity to do so. The Court of Appeal when it dismissed the earlier appeal was unaware of this fact. The appellants moved for permission to admit this fact as further evidence and sought an order that the appeal be re-opened. On the issue of admitting further evidence Lord Woolf CJ said this:

> It is a firm rule of practice that the Court of Appeal will not allow fresh evidence to be adduced in support of an appeal if that evidence was reasonably accessible at the time of the original hearing (see *Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489). Counsel for the respondents argued that this rule should preclude the appellants from seeking at this stage to base an allegation of bias on material

A that they could and should have deployed at the hearing of the original appeal. We consider that there is force in this submission. Arguably, this application should have been dismissed at the outset for this reason. A court of five judges has, however, been constituted in order to address the important issue of jurisdiction that arises on the facts of this case. In these circumstances we have decided to
B proceed on the basis that the appellants could not reasonably have become aware of the fact that the judge had not paid for MAB's services at the time of the original appeal and to overlook the discreditable manner in which that information was subsequently obtained. This will enable us to address the issue of jurisdiction that is raised by this application.

C

[74] The Lord Chief Justice then identified the issue that fell for decision. He said:

> The present application raises the question of whether the Court of Appeal has
D jurisdiction to reopen an appeal if *an appearance of bias can be demonstrated on the part of the court below*.
>
> (Emphasis added.)

Be it noted that the Court of Appeal was not considering the issue of whether
E it had jurisdiction to re-open on the ground of apparent bias on its part. It was concerned with the issue of re-opening an appeal on the ground of apparent bias on the part of the court of first instance. We emphasise this point because it is vital to appreciate the context in which the Lord Chief Justice uttered the words fairly accurately summed up in the headnote to the
F case and which have been relied upon by this court in its previous decisions (see, *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201) as enabling it to found jurisdiction under r 137 to review its own decisions:

> The Court of Appeal had a residual jurisdiction to reopen an appeal which it had
G already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such
H powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such a residual jurisdiction
I and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established, and that might justify the Court of Appeal in taking the exceptional course of reopening proceedings which it had

> already heard and determined. It should, however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune would also be relevant considerations. Where the alternative remedy would be an appeal to the House of Lords, the Court of Appeal would only give permission to reopen an appeal which it had already determined if it were satisfied that the House of Lords would not give permission to appeal.

At the risk of repetition we would say once again that the foregoing statement of the law was made in the context of a case in which the Court of Appeal had dealt with an appeal in ignorance of apparent bias on the part of the trial court. It was not a case in which bias was being alleged on the part of a member or members of the Court of Appeal itself.

[75] But that is not the case before us. The case before us is that at least one judge of *this court* — not the trial court — was guilty of apparent bias because of the nature of the comment he made in his judgment. And upon that point the decision in *Taylor v Lawrence* has no relevance or application. There is a further ground on which what was said in *Taylor v Lawrence* is not applicable to proceedings in this court. The Court of Appeal has power conferred upon it by the Courts of Judicature Act to admit further evidence in both criminal (s 61) and civil appeals (s 69(1) and r 7 of the Rules of the Court of Appeal 1994). But while this court has power to admit further evidence in criminal appeals (see s 93 of the Courts of Judicature Act) it has no such power in civil appeals. Accordingly, it is our considered judgment that what was said in *Taylor v Lawrence* about the existence of an inherent jurisdiction to re-open an appeal on the grounds of apparent bias of the trial court is applicable to civil appeals before the Court of Appeal but not to appeals heard by this court.

[76] The other authority that calls for comment is *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, ex parte Pinochet Ugarte* [2000] 1 AC 119. It is a case on which this court in its earlier decisions has placed reliance to assert a review jurisdiction. The facts of *Pinochet (No 2)* are notorious and do not call for re-statement. The case concerned an allegation of a real danger of bias or a reasonable apprehension or suspicion of bias on the part of a member of the judicial House of Lords. It was therefore a case of procedural unfairness and the challenge was taken by a litigant who was a party who was adversely affected by the earlier decision. It therefore comes as no surprise that the House there held that an appeal to it will only be reopened where a party, 'through no fault of its own, has been subjected to an unfair procedure. A decision of the House of Lords will not be varied or rescinded merely because it is subsequently thought to be wrong' (quote

A taken from the headnote to the case). If the facts of *Pinochet (No 2)* were to occur in this jurisdiction, we would well be able to act under r 137 to remedy the procedural injustice occasioned.

B [77] To sum up, this court has no inherent jurisdiction to review its earlier decision save on the very limited ground (i) that it contains clerical mistakes that makes its order unclear to such an extent that it will cause a miscarriage of justice; and (ii) that one or more of the parties have suffered procedural unfairness in the sense already discussed in the making of an order, eg, because through no fault of his, he was never heard before the order was made C or because decision on an appeal is tainted by a real danger of bias or a reasonable apprehension or suspicion of bias on the part of one or more members of the court who handed down the impugned judgment.

D [78] Some may see the view we take of the law on the subject under discussion as purchasing finality at the expense of justice. To them we can do no better than commend the words of Lord Simon of Glaisdale in the *Ampthill Peerage Case* [1977] AC 547, at p 576:

> E … the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law — by every system of law — of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set F aside. But such exceptional cases apart, the judgment must be allowed to conclude the matter. That, indeed, is one of society's purposes in substituting the lawsuit for the vendetta. Sometimes it is the parties to the litigation and those who claim through them who are bound by the judgment; but sometimes it is the whole world which must accept the decision.

G [79] Of course there is a remedy. It lies with Parliament; not with us. We cannot under the guise of interpreting r 137 arrogate unto ourselves an unauthorised legislative power. And there the matter must rest.

H *Appeal dismissed with no order as to costs.*

Reported by K Nesan

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